

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**ESTHER DOMINGUEZ, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Miami, FL, Employer**

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**Docket No. 04-2102  
Issued: July 22, 2005**

*Appearances:*  
*Ron Watson, for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On August 26, 2004 appellant filed a timely appeal from a June 17, 2004 merit decision of the Office of Workers' Compensation Programs, which denied modification of a November 11, 2001 decision of an Office hearing representative which affirmed the termination of appellant's compensation benefits for a back condition and a July 20, 2004 decision which denied her reconsideration request. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the June 17 and July 20, 2004 Office decisions.

**ISSUES**

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits for a back condition on February 7, 2001; (2) whether appellant established that she had any continuing employment-related back condition after February 7, 2001; and (3) whether the Office properly refused to reopen appellant's claim for further merit review. On appeal, appellant through counsel, contends that her disc herniations at L4-5 and disc bulges and annular tears at L2-3 and L3-4 were caused by the August 12, 1999 employment injury. Counsel further contends that the Office did not follow remand instructions provided by the hearing representative on November 5, 2001 and that it inappropriately denied merit review

in the July 20, 2004 decision in that the Office improperly applied the clear evidence of error standard and did not respond to a new argument made in the July 7, 2004 reconsideration request.

### **FACTUAL HISTORY**

On August 12, 1999 appellant, then a 46-year-old letter carrier, sustained employment-related lumbar and left hip strains when she slipped and fell while delivering a large parcel. She stopped work that day and has not returned.<sup>1</sup> She received appropriate continuation of pay and wage-loss compensation. Appellant came under the care of Dr. Edward Lazzarin, an orthopedic surgeon. A September 13, 1999 magnetic resonance imaging (MRI) scan of the lumbar spine was read by Dr. Graciela Pozo, Board-certified in diagnostic radiology, as demonstrating decreased density at L3-4 and L4-5, indicative of desiccation and the possible presence of a right lateral herniated disc at L5-S1. A February 9, 2000 MRI scan of the lumbar spine was read by Dr. David A. Saks, Board-certified in diagnostic radiology, as demonstrating a small right-sided disc herniation at L5-S1 with neural foraminal encroachment and possible impingement upon the right S1 nerve root.

On March 27, 2000 the Office referred appellant, together with a statement of accepted facts, a set of questions and the medical record, to Dr. David B. Keyes, Board-certified in orthopedic surgery. In a report dated April 6, 2000, Dr. Keyes described the history of injury and his review of the medical record and provided examination findings. His impression was history of low back pain with left leg pain and numbness “which I cannot substantiate by objective criterion,” stating that there were several inconsistencies on appellant’s physical examination. He found it doubtful that the small herniated disc at L5-S1 was causing the left leg symptomatology. In an attached work capacity evaluation, the physician advised that appellant had no limitations pending neurologic studies.

In an April 11, 2000 report, Dr. M. Seth Hochman, a Board-certified neurologist, noted the, prior MRI scan findings and appellant’s complaint of weakness in the left lower extremity and ordered electrical studies. An April 18, 2000 MRI scan of the abdomen and pelvis was interpreted by Dr. Ronald J. Landau, Board-certified in diagnostic radiology, as showing fluid in the endometrial cavity but was otherwise normal. In a report dated April 24, 2000, Dr. Hochman noted the abdominal MRI scan findings and advised that appellant’s electrical studies did not show any denervation in the left lower extremity with normal left peroneal and posterior tibial motor nerve conduction. Upon reexamination, he opined that appellant did not have a neurological problem with regard to her left lower extremity and no neurological disability from the employment injury. He concluded that from a neurological standpoint, she could return to her full duties.

Dr. Gail P. Ballweg, also Board-certified in neurology, provided an April 27, 2000 report in which she noted the history of injury and her review of the MRI scans and electrical studies. Dr. Ballweg noted findings on examination of the left lower extremity and diagnosed myofascial

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<sup>1</sup> Appellant returned to work for four hours on April 10, 2000.

syndrome, left lumbar, left leg weakness and diffuse paresthesias of undetermined etiology, rule out lumbar radiculopathy or plexopathy and left groin, pelvic pain, rule out pelvic lesion or mass.

In a report dated May 18, 2000, Dr. Keyes reviewed the reports of Drs. Hochman and Ballweg. In answer to specific Office questions, he opined that the electrical studies did not show an objective organic basis for appellant's pain and he did not feel there was any indication for further neurosurgical evaluation. He concluded that appellant was not disabled and, in an attached work capacity evaluation, advised that she could work eight hours per day without physical limitations.

Dr. Lazzarin continued to submit reports in which he opined that appellant could not work. Electromyography (EMG) and nerve conduction studies (NCS) of the left lower extremity, conducted by Dr. Ballweg on June 20, 2000, were normal other than noting decreased volitional activity in all the muscles of the left lower leg without abnormal spontaneous activity. In a July 12, 2000 report, Dr. Ballweg noted the EMG and MRI scan findings and decreased sensation on examination of the left lower extremity. Her impression was left lower extremity monoparesis of undetermined etiology.

The Office found that a conflict existed between the opinions of Dr. Lazzarin and Dr. Keyes regarding whether appellant continued to have residuals of her accepted lumbar and left hip strain. On June 7, 2000 it referred appellant, together with the medical record, a statement of accepted facts and a set of questions, to Dr. Lloyd A. Moriber, Board-certified in orthopedic surgery, for an impartial evaluation.

In a report dated July 5, 2000, Dr. Moriber noted the history of injury and appellant's complaints of pain. X-rays of the pelvis and left hip and lumbar spine were negative. He diagnosed a herniated disc at L5-S1 by MRI scan and left lumbar radiculitis. Dr. Moriber was unable to justify appellant's "intense subjective complaints," noting that there was good muscle tone and no significant muscle atrophy of the left lower extremity. In a September 12, 2000 work capacity evaluation, Dr. Moriber advised that appellant could work eight hours per day and that a psychiatric evaluation should be considered. In a report to the Office on September 13, 2000, the physician answered specific questions. He noted current objective findings of a herniated disc at L5-S1 by MRI scan. Dr. Moriber advised that appellant had no objective residuals of the August 12, 1999 employment injury and found no organic basis for her pain. He reiterated that she did not need further neurosurgical evaluation and was not a surgical candidate. Mr. Moriber advised that maximum medical improvement had been reached and that appellant was not disabled from working, again recommending psychiatric evaluation.

By letter dated September 20, 2000, the Office proposed to terminate appellant's compensation benefits on the grounds that she no longer had residuals of the August 12, 1999 employment injury. Appellant, through her representative, disagreed with the proposed termination and submitted a September 22, 2000 MRI scan of the lumbar spine, which was read by Dr. Landau as demonstrating disc bulging at T10-11, T11-12, L3-4 and L4-5, T11-12 disc space narrowing, bilateral neural foraminal stenosis at L3-4 and herniation at L5-S1. In an October 12, 2000 report, Dr. Lazzarin advised that appellant had been under his care since August 16, 1999. He diagnosed herniated disc, left hip sprain and noted the September 22, 2000 lumbar spine MRI scan findings which, he opined, were related to the August 12, 1999

employment injury. Dr. Lazzarin advised that appellant could not return to work pending additional neurosurgical evaluation. He submitted additional reports in which he reiterated his findings and conclusions.

The Office provided Dr. Moriber with the newly submitted medical evidence for his review and opinion and asked whether appellant would benefit from an intradiscal electrothermal (IDET) procedure. In a report dated January 24, 2001, Dr. Moriber advised that he would hesitate to recommend the IDET procedure and stated that he stood by his prior conclusions.

By decision dated February 7, 2001, the Office terminated appellant's compensation benefits, effective that day, on the grounds that the medical opinion evidence established that she no longer had residuals of her employment-related conditions.

On February 20, 2001 appellant requested a hearing and submitted additional medical evidence, including a March 14, 2001 MRI scan of the pelvis and left hip, read by Dr. Michael S. Thorpe, Board-certified in diagnostic radiology, as demonstrating fairly extensive left acetabular labral tearing with a para-labral cyst. A March 14, 2001 MRI scan of the lumbar spine, also read by Dr. Thorpe, demonstrated a right paracentral disc herniation at L4-5 and disc bulges and annular tears at L2-3 and L3-4 and no herniation at L5-S1. In reports dated February 1 and 26 and August 27, 2001, Dr. Lazzarin noted appellant's complaints of increased pain in the left hip and opined that she could not work.

At the hearing, held on August 29, 2001, appellant described the August 12, 1999 employment injury and her medical condition. Dr. Lazzarin also testified, opining that appellant received a severe left hip injury on August 12, 1999. He stated that the first MRI scan of appellant's hip was "open" because she was claustrophobic but that the second hip MRI scan, a closed study done on March 14, 2001, demonstrated extensive labral tears and a large cyst. He treated appellant for previous injuries to her ankle and knee and said she was not malingering. He recommended arthroscopic hip surgery. He addressed the lumbar spine MRI scan findings and said that appellant's symptoms were "most likely not" due to her spine, concluding that the majority of her problems were in regard to her hip, caused by the fall on August 12, 1999.

By decision dated November 5, 2001, the Office hearing representative affirmed the February 7, 2001 termination of benefits. The case was remanded to the Office to develop the medical evidence to determine if appellant had any continuing disability regarding her hip condition.

An MRI scan of the lumbar spine of November 26, 2001 was read by Dr. Thorpe as revealing a small posterolateral disc herniation at L4-5 and disc bulges and annular tears at L2-3 and L3-4 with disc space narrowing and disc bulge at T10-11. Repeat left hip and a pelvis MRI scan was read by Dr. Thorpe as demonstrating extensive tearing of the left acetabular labrum, unchanged when compared to the prior study with the cyst having decreased in size. In a treatment note dated November 29, 2001, Dr. Lazzarin noted that the tears seen on the lumbar spine MRI scan could perhaps explain the left-sided neuropathy.

On December 6, 2001 appellant was seen by Dr. Jorge Alvear, Board-certified in anesthesiology, for consultation regarding pain management. He noted her complaints of pain

and reviewed the November 26, 2001 MRI scans and findings of tenderness and pain on physical examination. He recommended a discogram which he performed on December 18, 2001. Dr. Alvear concluded that the results of the study were suggestive of discogenic pain at L3-4, L4-5 and, to a lesser extent, L5-S1. In a report dated December 20, 2001, Dr. Ronald F. DeMeo, Board-certified in anesthesiology, discussed treatment options.

In a report dated December 21, 2001, an Office medical adviser noted that a closed MRI scan was more accurate than an open study and thus the earlier open pelvis study would not demonstrate the traumatic changes. He concluded that the hip pathology present on the March 14, 2001 MRI scan was caused by the August 12, 1999 employment injury.

On January 4, 2002 the Office accepted that appellant's left hip strain with post-traumatic changes was employment related and a left hip arthroscopy was authorized. She received wage-loss compensation back to the date of termination, February 7, 2001 and was placed on the periodic rolls.

On January 30, 2002 appellant's representative requested reconsideration regarding the termination of benefits for appellant's back condition and submitted a January 16, 2002 report in which Dr. Alvear repeated the discogram findings, stating that appellant's discs at L3-4, L4-5 and L5-S1 had developed tears within their lining which caused appellant's pain. He opined that this condition was related to the August 12, 1999 employment injury and that appellant would benefit from IDET treatment or fusion surgery. In a January 23, 2003 report, Dr. Lazzarin opined that the findings on the March 14, 2001 lumbar spine MRI scan and discogram on December 18, 2001 were "new traumatic findings directly related to [appellant's] accident of August 12, 1999." He stated that appellant's hip was not the only source of pain, concluding that the discogram showed new traumatic findings which were not degenerative in nature and which explained her left leg symptoms. Dr. Lazzarin recommended IDET treatment. Dr. DeMeo also recommended the IDET procedure. Appellant also submitted records of the emergency room treatment she received on August 12, 1999. X-rays of the lumbar spine that day revealed no acute abnormality.

On February 11, 2002 Dr. Marc J. Philippon, a Board-certified orthopedic surgeon, performed a left hip arthroscopy with debridement of the labral tears. Drs. Lazzarin and Alvear submitted reports reiterating their findings and conclusions.

By decision dated March 18, 2002, the Office denied modification of the November 5, 2001 decision on the grounds that the medical evidence did not establish that appellant's current back condition was caused by the August 12, 1999 employment injury.

On September 20, 2002 appellant's representative again requested reconsideration and submitted the August 11, 2002 report from Dr. Lazzarin.

In a decision dated December 12, 2002, the Office denied appellant's reconsideration request, finding the evidence duplicative, repetitive and immaterial.

On February 28, 2003 appellant, through her representative, again requested reconsideration and submitted a January 9, 2003 report in which Dr. Lazzarin opined that the findings of the lumbar discogram had not been reviewed which, he reiterated, "were strictly

related to her accident of August 12, 1999.” In an April 16, 2003 work capacity evaluation, Dr. Philippon advised that appellant could not work as a letter carrier and needed to be evaluated regarding her back.

By decision dated June 3, 2003, the Office denied modification of the prior decision, finding the medical evidence insufficient to establish that appellant’s current back condition was causally related to the August 12, 1999 employment injury.

On April 26, 2004 appellant’s representative requested reconsideration and submitted reports dated February 26 and March 15, 2004, in which Dr. Lazzarin addressed appellant’s complaints of back and hip pain and advised that she could not work and perhaps needed hip replacement surgery. He advised that appellant sustained permanent injuries to her back and hip when she fell on August 12, 1999. He stated that neither the second-opinion examiner, Dr. Keyes, nor the impartial examiner, Dr. Moriber, had reviewed the more recent MRI scans or discogram, which documented a more extensive back injury.

By decision dated June 17, 2004, the Office denied modification of the June 3, 2003 decision, finding that appellant failed to establish that she had residuals of the lumbar spine causally related to the August 12, 1999 employment injury.

On July 7, 2004 appellant’s representative requested reconsideration, arguing that the Office did not review Dr. Lazzarin’s March 15, 2004 report in its June 17, 2004 decision and resubmitted the latter report. In a decision dated July 20, 2004, the Office denied appellant’s reconsideration request. The Office noted that the June 17, 2004 decision contained direct quotes from Dr. Lazzarin’s March 15, 2004 report and, therefore, counsel’s argument concerned duplicative evidence.

### **LEGAL PRECEDENT -- ISSUE 1**

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee’s benefits. The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>2</sup> The Office’s burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>3</sup> In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>4</sup>

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<sup>2</sup> *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>3</sup> *Gewin C. Hawkins*, 52 ECAB 242 (2001).

<sup>4</sup> *Anna M. Delaney*, 53 ECAB 384 (2002).

### **ANALYSIS -- ISSUE 1**

In the instant case, the Board found that a conflict in medical opinion existed between the opinions of appellant's treating physician, Dr. Lazzarin and Dr. Keyes who had provided a second-opinion examination for the Office, regarding whether appellant continued to have residuals of her accepted lumbar and left hip strains. The Office properly referred appellant to Dr. Moriber for an impartial medical evaluation.

By report dated July 5, 2000, Dr. Moriber noted his review of the medical record and provided physical findings. In a September 12, 2000 work capacity evaluation, the physician advised that appellant could work eight hours per day and in a report telefaxed to the Office on September 13, 2000 he answered specific Office questions and noted MRI scan findings of herniated disc at L5-S1 and advised that appellant had no objective residuals of the August 12, 1999 employment injury.

Appellant thereafter submitted a September 22, 2000 MRI scan of the lumbar spine and an October 12, 2000 report in which Dr. Lazzarin reiterated his opinion that appellant's back and hip conditions were related to the August 12, 1999 employment injury. The Office furnished Dr. Moriber with these reports and in a January 24, 2001 report, he advised that he stood by his prior conclusions.

The Board finds that the opinion of the impartial examiner Dr. Moriber is entitled to special weight as he provided thorough, well-rationalized reports in which he noted his review of the complete medical record available to him at the time of his reports, the statement of accepted facts and questions provided, as well as findings from his examination of appellant and his review of objective studies. His opinion was, therefore, sufficient to meet the Office's burden of proof to terminate appellant's compensation benefits on February 7, 2001.

### **LEGAL PRECEDENT -- ISSUE 2**

As the Office met its burden of proof to terminate appellant's compensation benefits regarding her accepted back condition, the burden shifted to her to establish that this condition after February 7, 2001 was causally related to the August 12, 1999 employment injury.<sup>5</sup> To establish a causal relationship between the condition and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.<sup>6</sup> Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.<sup>7</sup> Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of

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<sup>5</sup> *Manuel Gill*, 52 ECAB 282 (2001).

<sup>6</sup> *Id.*

<sup>7</sup> *Donna L. Mims*, 53 ECAB 730 (2002).

reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>8</sup>

In assessing medical evidence, the number of physicians supporting one position or another is not controlling. The weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.<sup>9</sup> A physician's opinion on causal relationship between a claimant's disability and an employment injury is not dispositive simply because it is rendered by a physician. To be of probative value, the physician must provide rationale for the opinion reached. Where no such rationale is present, the medical opinion is of diminished probative value.<sup>10</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that, contrary to appellant's assertion on appeal, the November 5, 2001 decision of the Office hearing representative affirmed the termination of benefits on February 7, 2001 but remanded the case to the Office to develop the medical evidence to determine whether she had any continuing disability regarding only her hip condition. Following remand, the Office properly requested that an Office medical adviser review the medical record and based on his report dated December 21, 2001, appellant's left hip condition of left hip strain with post-traumatic changes was accepted as employment related. She thereafter received wage-loss compensation back to February 7, 2001, the date of termination and was returned to the periodic rolls.<sup>11</sup>

The Board finds that appellant did not meet her burden of proof to establish that her back condition after February 7, 2001 was related to the August 12, 1999 employment injury. The accepted condition was lumbar strain and the relevant medical evidence<sup>12</sup> regarding appellant's back condition after February 7, 2001 includes MRI scans of the lumbar spine done on March 14 and November 26, 2001, which demonstrated a herniated disc at L4-5 and annular tears at L2-3 and L3-4 and no herniation at L5-S1. Appellant also had a discogram, performed by Dr. Alvear

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<sup>8</sup> *Leslie C. Moore*, 52 ECAB 132 (2000); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>9</sup> *Anna M. Delaney*, *supra* note 4.

<sup>10</sup> *Thaddeus J. Spevack*, 53 ECAB 474 (2002).

<sup>11</sup> The reinstatement of appellant's wage-loss benefits as of February 7, 2001, rendered moot the termination of wage loss for the back condition. This left the issue outstanding as to whether her ongoing back condition was related to the accepted injury for purposes of medical treatment.

<sup>12</sup> Appellant also submitted reports from Drs. DeMeo and Philippon. Neither physician, however, commented on the cause of appellant's back condition and medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship. *Michael E. Smith*, 50 ECAB 313 (1999).



on December 18, 2001 which, he opined, was suggestive of discogenic pain at L3-4, L4-5 and, to a lesser extent, at L5-S1.

Dr. Lazzarin submitted numerous treatment notes and reports in which he advised that appellant's back condition was caused by the August 12, 1999 employment injury. At the hearing, he testified that appellant's problems were "most likely not" due to her spine but were caused by her hip condition. In a November 29, 2001 treatment note, he advised that the tears seen on the lumbar MRI scan could perhaps explain appellant's left-sided neuropathy and, in a January 23, 2003 report, opined that the findings on the March 14, 2001 lumbar spine MRI scan and December 18, 2001 discogram were "new traumatic findings" directly related to employment injury. He stated that the discogram showed new traumatic findings which were not degenerative in nature. Dr. Alvear also opined that discogram findings of tears at L3-4, L4-5 and L5-S1 caused appellant's significant pain and opined that this was caused by the employment injury.

The Board finds these medical opinions insufficient to establish appellant's claim. Neither physician provided sufficient rationale to explain why the annular tears, which did not appear on the lumbar spine MRI scans dated September 13, 1999 and February 9, 2000, were caused by the August 12, 1999 injury. The prior MRI studies were reviewed by both Dr. Keyes and Dr. Moriber, who noted the herniated disc at L5-S1. Dr. Moriber found that appellant had no residuals of the accepted August 12, 1999 lumber strain. He also reviewed the September 22, 2000 lumbar spine MRI scan and reiterated his conclusion that the accepted lumber strain had resolved.

The Board notes that the MRI scan findings of disc herniations and tears first demonstrated on the March 14, 2001 MRI scan, 19 months after the 1999 injury, are not probative evidence that these conditions were caused by the accepted injury, especially as three prior MRI scans did not demonstrate these findings. While there is discussion in the record that a closed MRI scan is more accurate than an open study, the earlier MRI scans done on September 13, 1999, February 9 and September 22, 2000, all demonstrated positive findings. This is not a case where objective testing was delayed. Rather, it is a case where the later testing demonstrated new findings. The time lag between the August 12, 1999 slip and fall and the findings first demonstrated on March 14, 2001 present a greater likelihood that an event not related to the employment caused or worsened the condition for which appellant now seeks compensation. When the delay becomes so significant that it calls into question the validity of an affirmative opinion based at least in part on the testing, such delay diminishes the probative value of the opinion offered.<sup>13</sup> While testing conducted well after the date of an alleged injury may document the injury claimed and may provide a sound basis upon which to find causal relationship, to discharge an employee's burden of proof, a physician must provide sufficient medical rationale to support the affirmative opinion offered regarding this testing.<sup>14</sup> A mere conclusion without the necessary medical rationale explaining how and why the physician believes that a claimant's accepted exposure could result in a diagnosed condition is not sufficient to meet the claimant's burden of proof. The medical evidence must also include

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<sup>13</sup> See *Mary A. Ceglia*, 55 ECAB \_\_\_\_ (Docket No. 04-113, issued July 22, 2004).

<sup>14</sup> See *Linda L. Newbrough*, 52 ECAB 323 (2001).

rationale explaining how the physician reached the conclusion he or she is supporting.<sup>15</sup> The Board finds that neither Dr. Lazzarin nor Dr. Alvear provided sufficient explanation to support their stated conclusion that the findings of the 2001 MRI scans or discogram were caused by the August 12, 1999 employment injury. The evidence does not establish that appellant's back condition after February 7, 2001 is related to the accepted employment injury.

### **LEGAL PRECEDENT -- ISSUE 3**

Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).<sup>16</sup> This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>17</sup> Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>18</sup>

### **ANALYSIS -- ISSUE 3**

The Board initially notes that on appeal counsel contended that the Office inappropriately used the clear evidence of error standard. While a brief sentence in the July 20, 2004 decision states "the evidence supplied did not show clear evidence of error on the part of this Office," the law cited and conclusion reached by the Office clearly show that the Office relied on the proper legal standard in reaching its decision. The Board thus deems this error harmless.<sup>19</sup>

With her July 7, 2004 reconsideration request, it was contended that the Office had not considered Dr. Lazzarin's March 15, 2004 report in the June 17, 2004 decision. The Board, however, finds that the language of the June 17, 2004 decision, which contains direct quotes from Dr. Lazzarin's March 15, 2004 report, clearly establishes that this report was reviewed and considered in the Office decision. Appellant also resubmitted Dr. Lazzarin's March 15, 2004 report; however, the Office considered this report in the June 17, 2004 decision and this evidence was duplicative. Appellant also failed to submit relevant and pertinent new evidence not

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<sup>15</sup> *Beverly A. Spencer*, 55 ECAB \_\_\_\_ (Docket No. 03-2033, issued May 3, 2004).

<sup>16</sup> 20 C.F.R. § 10.608(a).

<sup>17</sup> 20 C.F.R. § 10.608(b)(1) and (2).

<sup>18</sup> 20 C.F.R. § 10.608(b).

<sup>19</sup> *See Joan F. Martin*, 51 ECAB 131 (1999). The Board notes that the Office referred to Office regulations found at 20 C.F.R. § 10.138(b). In 1999 these regulations were replaced by those now found at 20 C.F.R. § 10.608. However, as the language contained in the regulations found at § 10.138(b) and § 10.608 is essentially the same, this was harmless error.

previously considered by the Office.<sup>20</sup> The Office properly determined that appellant's request did not constitute a basis for reopening the case for further merit review.

Appellant also contended that new argument was presented with appellant's July 7, 2004 reconsideration request, *i.e.*, that neither Dr. Keyes nor Dr. Moriber had reviewed the later MRI scans. The Board notes that this argument was raised by Dr. Lazzarin in the March 15, 2004 report which, was considered by the Office in its merit decision of June 17, 2004. Appellant, therefore, did not advance a relevant legal argument not previously considered by the Office and the Office properly denied merit review.

### **CONCLUSION**

The Board finds that the Office met its burden of proof to terminate appellant's benefits effective February 7, 2001 for her employment-related back condition. The Board further finds that appellant failed to meet her burden of proof to establish that her back condition after February 7, 2001 is causally related to the August 12, 1999 employment injury. The Office properly refused to reopen appellant's claim for further merit review on July 20, 2004.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated July 20 and June 17, 2004 be affirmed.

Issued: July 22, 2005  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>20</sup> *Supra* note 17.